Supreme Court, U.S.
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No. 02-1271

In the

Supreme Court of the United States

CITY OF CHARLESTON, SOUTH CAROLINA,

Petitioner,

v.

A FISHERMAN'S BEST, INC., AFB OF CHARLESTON, INC., IVAN MILLER, and THE FISHING VESSEL TRI LINER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondents submit that the following questions more accurately reflect the fundamental legal claims that Petitioner has presented:

1) Whether the "proprietary capacity exception" to the doctrine of preemption applies to the city resolution prohibiting the landing of fish caught with certain types of legal fishing gear from utilizing a city maritime center built with a federal grant available only to a governmental entity.

2) Whether federal fishery regulations preempt a municipal legislative enactment effectively banning the landing of fish caught with certain types of legal fishing gear.

LIST OF PARTIES

Appellee Below:

The City of Charleston, South Carolina, a municipal corporation

Appellants Below:

A Fisherman's Best, Inc., a corporation organized and existing under the laws of the State of Florida

AFB of Charleston, Inc., a corporation organized and existing under the laws of the State of South Carolina

Ivan Miller

The Fishing Vessel Tri Liner

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent A Fisherman's Best, Inc. has no parent companies or non-wholly owned subsidiaries. Respondent AFB of Charleston, Inc. has no parent companies or non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

Respondents incorporate by reference the statement of the facts set forth by the United States Court of Appeals for the Fourth Circuit. (A-2 to 28).

Respondents must emphasize that Petitioner's Statement of the Case provides only a highly selective history of the Charleston Maritime Center. Petitioner ignores the distinctly governmental process that enabled the City of Charleston to construct the Maritime Center. This process is set forth in detail in the Panel's opinion. (A-6 to 27). The Panel emphasized that the City constructed the Charleston Maritime Center with millions of dollars in federal funds from the Economic Development Administration of the United States Department of Commerce. (A-10). The EDA provided the "Special Economic Development and Adjustment Assistance" grant to the City pursuant to Title IX, § 903 of the Amended Public Works and Economic Development Act of 1965, 42 U.S.C. § 3243 (repealed 1998). The grant program that funded the Maritime Center is available only to government entities. These grants are limited to "State and local areas" to "encourage intergovernmental action" to "solve economic adjustment problems." 42 U.S.C. § 3241 (repealed 1998). The City now asks to be treated as a private entity, yet was able to utilize federal largesse to build the Maritime Center solely by dint of its governmental status.

The City, moreover, agreed to Federal regulation and requirements to obtain the grant. The EDA was required under the EDA Grant's Special Terms and Conditions to provide "prior written approval" for "[a]ny leasing or renting of the facilities involved in the project . . . . ." EDA Grant Special Terms and Conditions at 6

(filed under separate cover with Appellants' Reply Brief to the Fourth Circuit).[1] In fact, by applying for and accepting the EDA grant, the City agreed to abide by numerous federal statutes, as set forth in the language of the grant. *Id.* at 3-5; EDA Grant General Terms and Conditions for Construction Components at 1-10 (filed under separate cover with Appellants' Reply Brief to the Fourth Circuit). Included in these requirements are numerous federal labor laws, including the Davis-Bacon Act, 40 U.S.C. § 276(a)(5); the Contract Work Hours Standard Act, 40 U.S.C. §§ 327-332; and the Copeland "Anti-Kickback" Act, 40 U.S.C. § 276(c), 18 U.S.C. § 874. It is more than passingly ironical, then, that the City would now rely so heavily on *Building & Construction Trades Council v. Associated Builders and Contractors*, 507 U.S. 218 (1993), where the issue specifically involved **exemption** from Federal labor standards.

The Appeals Panel also detailed the highly-politicized process whereby the City twice assigned management of the Maritime Center to its operator, the Parks and Recreation Commission ("PRC"), only to then withdraw that authority via its "legislative"[2] disapproval of the PRC's sub-leasing award to Respondents based on over-arching policy reasons involving the conduct of pelagic longline fishing in the U.S. Exclusive Economic Zone. (A-11 to 27).

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[1] Respondents will provide the Court with copies of the materials cited herein (or any other part of the records below) should the Court so request.

[2] Even Judge Luttig's dissent acknowledges the "legislative" aspect of what actually amounted to the City's serial countermanding of the Maritime Center's business operator, the PRC. (A-67).

REASONS FOR DENYING THE WRIT

Despite Petitioner's attempts to style this case as one presenting a constitutional conflict regarding the preemption doctrine, the petition for *certiorari* focuses on the Fourth Circuit's application of the case law of this Court and the circuit courts to the specific facts of this matter. Stripped of its rhetoric, the petition essentially objects to the Fourth Circuit's factual decision that the City ordinance was a regulation that interfered with federal fisheries law. However, salient to the issue of *certiorari*, the Panel correctly articulated and then applied the legal standards elucidated by this Court and other circuit courts to the facts of this case.

In this case, the Appeals Court found that: 1) the City's resolution frustrated the purpose of Federal fishing regulations and was, thus, preempted, and 2) the "proprietary capacity exception" to the preemption doctrine did not save this extensive municipal regulation. That other courts have reached contrary conclusions as to the application of the proprietary capacity exception when applying the same legal standards to different factual circumstances does not create a conflict meriting *certiorari*. Petitioner fails to demonstrate a conflict with federal case law regarding the law of preemption or the proprietary capacity exception. Petitioner's effort to cloak its factual claims in the language of legal conflict must thus fail, as the Petitioner has not satisfied the standard for *certiorari* set forth by Supreme Court Rule 10(a).

Respondents thus respectfully urge this Honorable Court to deny the Petition for Writ of *Certiorari*.

I. THE FOURTH CIRCUIT'S DECISION REGARDING THE "PROPRIETARY CAPACITY EXCEPTION" DOES NOT CONFLICT WITH EXISTING PRECEDENT

Petitioner initially and incorrectly asserts that the Fourth Circuit's ruling is directly at odds with both Supreme Court and Federal Appellate Court precedent applying the proprietary capacity exception to the preemption doctrine. Pet. at 11. This contention is meritless.

A. The Ruling Is In Harmony with Supreme Court Precedent

In the Fourth Circuit, the Petitioner argued that the proprietary capacity exception applied as a defense to Respondents' preemption claim. (A-55). The Fourth Circuit disposed of this contention by first delineating the purposes of the statute at issue, the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), 16 U.S.C. §§ 1801-1883 (A-57 to 58), and then by referring to its extensive analysis earlier in the opinion addressing the City's motive and bases for the regulation. (A-46 to 49). Accordingly, the Panel concluded:

> The City does not say that a proprietary exception may be inferred from these purposes [of the Magnuson-Stevens Act] or from any other basis. Rather, it points to what it did as a predicate for existence of an exception. It refers to its passing a resolution as opposed to adopting an ordinance and it denies that it was intending to regulate fish (**a denial we have rejected**). This alleged state of

> mind does not appear to have been made known to defendants, and it is inconsistent with the face of the resolution itself.

(A-58) (emphasis added).

This approach follows, and is consistent with, this Court's holding in *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218 (1993). In *Building & Construction Trades*, this Court distinguished between a governmental entity acting as a business person and one acting to set policy. "When the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding. Moreover, as a regulator of private conduct the state is more powerful than private parties. These distinctions are far less significant when the State acts as a market participant **with no interest in setting policy**." 507 U.S. at 230 (emphasis added).

For its part, the Fourth Circuit held as a matter of fact in this specific case that the City acted as a regulator with a policy, not a business, motive[3], and that it passed what amounts to a law to do so. The Panel examined and then rejected the City's *post hoc* cavils about the difference between a resolution and an ordinance, as follows:

> The City intended the resolution to be an obstacle. Utilization of longline tackle by

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[3] Judge Luttig's dissent and the district court's decision highlight that the issue of whether the City was regulating presents "a very fact specific determination." (A-67 (quoting J.A. 345) (district court opinion)).

> a vessel was a means to deny access to the docks by longline vessels, and denial of access was a means to control or limit the swordfish industry in waters off South Carolina and to discourage non-local vessels from coming to fish in those waters. The City's opposition was directed at the industry.

(A-49).[4] Indeed, devoid from the City's resolution was any business-related justification for kicking the longliners out. As noted above, the Panel found no such justification. (A-58).

Further, the Fourth Circuit found no explicit creation of a zone of protected market conduct in the Magnuson-Stevens Act or the case law implementing it. (A-57 to 58). Then, after an extensive analysis of the structure of the federal fishery management system, both in general (A-28 to 30), and as applied to the pelagic longline fishery operating around Charleston (A-36 to 41), the Panel found that the City would have had to distort the Magnuson-Stevens Act's provisions in order to defeat preemption by way of implying a statutory basis for the proprietary capacity exception. (A-57 to 58). Accordingly, in examining the purposes of the Magnuson-Stevens Act, the Panel found that no explicit **or** implicit basis existed for such an exception to preemption. (A-58).

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[4] Logically, the Panel's decision that the resolution amounted to "regulation," A-50, 51, 58, **itself** determines the issue relating to the application of the proprietary capacity exception. As this Court has held, "Our decisions in the area support the distinction between government as a regulator and government as proprietor." *Building & Construction Trades Council*, 507 U.S. at 227. Judge Luttig's dissent is consistent. (A-66 to 67) ("As to the first flaw, 'preemption doctrines apply only to state regulation . . . .'") (citation omitted).

Petitioners unavailingly try to contrast the Panel's analysis under the Magnuson-Stevens Act with the analysis of the National Labor Relations Act conducted by this Court in *Building & Construction Trades*, 507 U.S. at 227 ("We have held consistently that the NLRA was intended to supplant state labor *regulation*, not all legitimate state activity that affects labor."). Yet, while the ultimate holdings are different, the Panel faithfully followed this Court's analytical framework. As noted, the Panel did not ignore the standard set out in *Building & Construction Trades* or the Supreme Court precedent from the dormant commerce clause area, *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), and *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). In fact, the Panel set it forth correctly and in the broadest possible manner: does the statute involved explicitly provide for a zone of proprietary activity and, if not, can one be implied? (A-56 to 57; *quoting Building & Constructions Trades*, 507 U.S. at 231). Indeed, the Supreme Court in *Building & Construction Trades* undertook precisely the same consideration of whether an explicit or implicit statutory basis for a proprietary capacity exception existed under the NLRA. *See* 507 U.S. at 224-25. Petitioner cannot distort the Panel's elucidation of the proper legal inquiry as to the exception set forth by this Court.

At its essence, then, Petitioner's claim is that because the Fourth Circuit ruled that the proprietary capacity exception did not apply to this particular set of factual circumstances – in contrast to the Supreme Court's factual conclusion in *Building & Construction Trades* – it necessarily misapplied the legal standard. Any fair examination of the decision reveals, however, that the regulatory nature of the City ordinance in this case differed from the commercial nature of the actions

in *Building & Construction Trades. See* 507 U.S. at 232. Accordingly, the Panel's decision is in accord with this Court's precedent.

B. The Ruling Does Not Conflict With the Law of Other Circuits

The Petitioner also maintains that the Fourth Circuit decision is in conflict with a number of other circuit court decisions. Again, this contention attempts to manufacture conflict where none exists.

As noted, in this matter, the Panel inquired whether the Magnuson-Stevens Act "creat[ed] a proprietary exception" or whether there is any "basis for concluding that such an exception is implied." (A-57). This approach mirrors that of **every** other opinion cited by Petitioner in support of its argument. Specifically, just as the Panel did in this matter, each circuit court examined the federal statute at issue to determine whether it either explicitly or implicitly permitted the exception:

Second Circuit—In *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420 (2d Cir. 2002), the court stated "we see nothing in the [statute] to suggest that Congress meant to preempt a governmental entity's conduct that does not amount to regulation; and the structure and language of the TCA suggest precisely the contrary intent. . . . Thus, unless a limitation is provided in [the statute], we must infer that Congress's intent to preempt did not extend so far."

Fifth Circuit—In *Cardinal Towing & Auto Repair, Inc. v. Bedford, Texas*, 180 F.3d 686, 695 (5th Cir. 1999), the court examined whether a city towing ordinance was exempted from federal preemption by

the proprietary capacity exception. In examining the federal statute, the court concluded that the federal statute "allowed for a proprietary analysis" and that the "spirit and purpose" of the statute was consistent with such a result.

Sixth Circuit—In *Petrey v. Toledo*, 246 F.3d 548, 557 (6th Cir. 2001)[5], the court held that the express preemption provision at issue in the federal statute was strikingly similar to the ERISA preemption statute to which the proprietary exception applied and "aside from the statutory language, the municipal-proprietor exception is consistent with the purpose of [the federal statute]."

Ninth Circuit—In *Alameda Newspapers, Inc. v. Oakland*, 95 F.3d 1406, 1416 (9th Cir. 1996), the court held "we are not willing to assume that Congress wished to limit the right of states or municipalities to participate in consumer boycotts or intended to compel them to act in a manner that contravenes their civic consciences – at least in cases in which their action would not have some 'real effect' or practical economic impact on the employer that is either different from that of the ordinary consumer or is otherwise governmental in nature."

While Petitioner cites each of these cases in support of its assertion that the Fourth Circuit misapplied the law pertaining to preemption (Pet. at 20-23), there is no actual conflict. The only difference between these cases is factual. In other words, in each of the aforementioned matters, the court assessed the statute at issue and held that, given the facts at issue,

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Reversed on other grounds, City of Columbus v. Ours Garage & Wrecker Service, Inc., 536 U.S. 424 (2002).

the proprietary exception would be applied under the statute at issue. In this matter, relying on the extensive regulation applied by the Magnuson-Stevens Act and strong evidence that the City intended to regulate the use of longline fishing gear (A-57 to 58), the Panel reached a different result. On this record, *certiorari* is simply not warranted.

II. PETITIONER MERELY CHALLENGES ONLY THE FOURTH CIRCUIT'S FACTUAL DECISION THAT ALL LONGLINE FISHING WAS PREEMPTED BY THE CITY ORDINANCE

Petitioner's second assertion is that the City resolution "does not obstruct the federal interest intended to be furthered by the [Magnuson-Stevens] Act." Pet. at 24. Petitioner does not assert that the Panel misapplied the basic tenets of federal preemption law. Rather, it asserts that the ordinance would not bar landings by longliners in the Charleston area and thus the system created by federal regulations expressly allowing such landing would not be frustrated *Id.*

In echoing the dissent to the Appeals Court's decision (A-66 to 70), Petitioner focuses upon the practical effects of the City's ban on landings by longline fishermen. Pet. at 27-28. This issue, however, is a strictly factual one, and even the dissenting opinion does not take issue with the majority's analysis of the law of preemption, but instead addressed the factual issue of the quantum of "interference with activities protected by the Magnuson Act." (A-68).[6]

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[6] Indeed, as to the law, Judge Luttig agreed with the majority of the Panel that, "Allowing individual municipalities to prevent longline fishermen from landing in their respective jurisdictions would allow municipalities to produce, piecemeal, conflicts such as

As to the application of the facts to the preemption doctrine, the Panel assessed the evidence in the summary judgment record regarding the preclusive effects of the City ordinance and the availability of alternative landing sites (A-33 to 36). It concluded that no other viable landing spots existed and thus, that legal landings by longliners were frustrated (*Id.*). Petitioners ask this court to second-guess that factual decision on the summary judgment record.

As this issue is a factual one, Supreme Court rules strongly disfavor a grant of *certiorari* on this basis. Supreme Court Rule 10 ("A petition for a writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . .").

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that held to be preempted in *Southeastern Fisheries Assoc., Inc. v. Chiles*, 979 F.2d 1504 (11th Cir. 1992)." (A-68).

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the *Petition for Certiorari*.

Respectfully submitted,

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